BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Mark Smith alleging discrimination in employment on the basis of race and colour.

B E T W E E N:

Ontario Human Rights Commission

-and-

Mark Smith

Complainant

-and-

Mardana Limited (carrying on business as Mr. Lube), Don Strynadka, Rob Neal, Keel Staff Enterprises Inc., and Iswood Holdings Inc.

Respondents

INTERIM DECISION

Adjudicator: Alvin B. Rosenberg

Date: December 19, 2001

Board File No.: BI-0366-00

Decision No.: 01-030-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Raj Dhir
	)	
Mr. Mark Smith, *Complainant*	)	Andrew Pinto
	)	
For all of the *Respondents*	)	Stephen A. Bernofsky
	)	

FIRST DECISION

At the opening of the hearing, counsel for the Commission and counsel for Smith moved that two additional respondents be added, the corporate owners of the Concord Mr. Lube and of the Woodbridge Mr. Lube. The Commission and Mr. Smith were at all times under the impression that Mardana was the owner of all three stores. Mr. Strydnadka, the respondent, is the president of all three corporations, and has been a party to the proceedings, both at the Commission and before the Board of Inquiry (the "Board"). Mr. Strydnadka has been present at the hearing at all times.

At the time that the motion was made, I wrote out a short endorsement as follows:

> There is no evidence indicating how the Commission became of the view that Mardana owned all 3 franchises. However, the record indicates this clearly.
>
> All pleadings, correspondence and submission up to the time the hearing started make this quite clear.
>
> Mr. Strydnadka is President of all 3 Corporations. He must have known that Mardana only owned Brampton.
>
> From the evidence, the 3 franchises were intermingled in their operation - hiring - firing - head office, etc.
>
> Even if the Respondents did not create the original impression that Mardana owned all 3 franchises, they must have been aware of the misconception.
>
> Mr. Strydnadka's awareness is as President of the other 2 companies under all of the circumstances attributed to the other two companies.
>
> Mr. Strydnadka has been in attendance at the hearing at all times. Iswood Holdings Inc. and Keel Staff Enterprises Inc. are necessary respondents and are added accordingly.

At the opening of the hearing on the following hearing date after my ruling, Mr. Bernofsky advised that he had authority to represent the newly added respondents and the proceedings have continued on that basis.

SECOND DECISION

At the end of the hearing on November 29, counsel for the Commission and counsel for Mr. Smith advised that they were closing their case, subject only to the possibility that certain productions from the respondents have not been received and if, on receiving those productions, they are of the view that they wish to recall Mr. Smith, they will move accordingly for leave at that time. In a similar way, counsel for Mr. Smith and counsel for the Commission were going to produce certain medical records for the respondents' counsel and these had not as yet been produced. Other than these two matters, the case for Mr. Smith and the Commission had been concluded. At that point, Mr. Bernofsky, on behalf of all of the respondents, advised that he would be moving to have the matter dismissed as against Don Strynadka as there had been no evidence of any misconduct by Mr. Strynadka. I advised that before we dealt with the evidence or lack of evidence or the merits of the application, we would have to deal with the question of whether or not the motion was equivalent to a motion for a non suit and required an election whether to call evidence or not before hearing the motion.

Mr. Bernofsky argued that this application is not similar to a non-suit motion and referred to the case of *Bird v. Aphetow House Ltd.* (1988), 9 C.H.R.R. D/711 (Ont.Bd.Inq.). He referred the Board to the following quotation from that decision, at para. 35248:

> Section 38(3) [now 39(3)] provides that a party may be added by the board of inquiry at any stage of the proceeding upon such terms as the board considers proper. There is no reference to parties being removed by the board of inquiry. However, that is also implicit. A specific reference to adding parties is probably related to the potential prejudice which could occur in the absence of appropriate terms such as adequate notice. The same considerations do not apply to removing parties. In the situation where additional respondents are included in the complaint but excluded from the terms of reference of a board of inquiry, such additional parties should be removed, *prima facie*. The onus of establishing a justification for including them under section 38(3) [now 39(3)] then would have to be established by the party seeking their inclusion.

Mr. Bernofsky argued that this is authority for the proposition that even, as here, where the Commission referred the case against Mr. Strynadka to the Board, that the onus was still on the Complainant and the Commission to justify including Mr. Strynadka.

I do not read the decision in that way. In my view, the proper approach is that which was taken by Lorne Slotnick, Adjudicator in the case of the *Ontario Human Rights Commission and Dena Potocnik and City of Thunder Bay (No.2)* C.H.R.R. NP/96-85. In that case, the Adjudicator found at para. 4 that:

> The City concedes that an election is the normal procedure on a motion to dismiss (a non-suit) in a civil case, but argues that the rules are less rigid in an administrative tribunal such as this, and that the particular circumstances of this case make it just and convenient not to force an election.

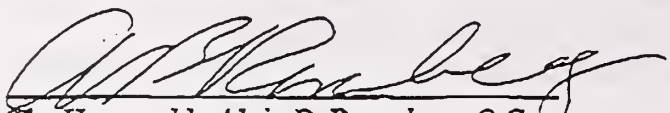
The learned Adjudicator went on to say at para. 18:

> I am satisfied that the circumstances of this case warrant a departure from the usual rule compelling a respondent from electing whether to call evidence before its motion to dismiss for lack of evidence can be heard. The issue here is how to strike a balance between, on the one hand, the possible prejudice to the complainant and the Commission from my hearing and deciding a motion to dismiss at this point in the proceedings; and, on the other hand, the unfairness of continuing with a hearing if, in fact, the City can make the case that there is not enough evidence to continue. In this particular case, I believe the potential prejudice to the Commission and complainant is at a far lower level than it would be in most cases, because most of the major players who would have been expected to testify for the City have already given evidence, and because the City has, at the Commission's request I might add, disclosed hundreds of documents. The Commission cannot thwart this motion simply with a vague hope that the City's evidence will bolster the Commission's own case, given these circumstances.

Applying the same test, the Board is unlikely to know what was Mr. Strynadka's involvement in the alleged conduct without hearing all of the evidence. Putting it another way, if it is found that the premises are maintained in a way that breaches provisions of the Ontario *Human Rights Code*, then the Board will be in a better position, having heard all of the evidence, to determine whether or not Mr. Strynadka has any liability arising therefrom.

Accordingly, I dismiss the motion without prejudice to the right to bring a similar motion at the end of the evidence.

Dated at Toronto, this 19th day of December 2001.



The Honourable Alvin B. Rosenberg, Q.C.
Member